

**STATE OF NORTH CAROLINA**

**BEFORE A STATE HEARING REVIEW OFFICER  
FOR THE STATE BOARD OF EDUCATION  
PURSUANT TO G.S. 115C - 109.9**

█ by and through █ parent, █  
Petitioners

v.

**Durham Public Schools Board of Education,  
and N.C. State Board of Education**  
Respondent

**DECISION**

**18 EDC 04980**

This is an appeal of portions of the Final Decision and Order of Administrative Law Judge Stacey B. Bawtinheimer for the case, █ by and through parent, █ v. Durham Public Schools Board of Education and N.C. State Board of Education (18 EDC 04980). The Decision was issued on April 11, 2019. The Respondent appealed portions of the Decision on April 26 and the undersigned Review Officer was appointed on April 29, 2019.

The records of the case received for review were contained on one (1) CD which contained: the ALJ's Final Decision and Order, an extensive file of documents pertaining to the case, and seven (7) numbered transcripts of the hearing. The file of documents was one (1) 4005 page PDF file containing numerous motions from both parties, decisions of the ALJ pertaining to those motions, many ALJ orders, correspondence during the case, exhibits entered during the hearing, and proposed decisions.

**Appearances:**

- For Petitioner: Stacey M. Gahagen; Gahagen Paradis, P.L.L.C., 3326 Durham Chapel Hill Boulevard, Suite 210-C, Durham, NC 27707
- For Respondent DPS: Stephen G. Rawson and Catherine Laney; Tharrington Smith, LLP, PO Box 1151, Raleigh, NC 27602-1151
- For Respondent SBE: Tiffany Lucas, Special Deputy Attorney General, North Carolina Department of Justice, PO Box 629, Raleigh, NC 27602-0629

For convenience and privacy, the following are used in this Decision to refer to the parties:

For the Student/Petitioner – █  
For Parent/Petitioner – █ █  
For Respondent - Respondent; Durham Public Schools; DPS

## ISSUES

The ALJ determined the Issues to be decided were:

1. Whether Durham Public Schools evaluated [REDACTED] in all suspected areas of disability, in particular, Autism and Specific Learning Disability (the "Suspected Disability Claim") and whether the evaluation process was appropriate (the "Evaluation Claim")?
2. Whether Durham Public Schools appropriately determined that [REDACTED] was not eligible for special education and related services at the August 15, 2017 IEP meeting (the "Eligibility Claim")?
3. Whether Durham Public Schools' Limited Relationship Provision included in the IEE Contracts significantly impeded [REDACTED]'s right to participate in the decision-making process regarding the provision of a FAPE to [REDACTED] or otherwise violated Petitioners' procedural safeguards (the "IEE Contract Claim")?
4. Whether the North Carolina State Board of Education significantly impeded [REDACTED]'s right to participate in the decision-making process regarding the provision of a FAPE to [REDACTED] by sanctioning Durham Public Schools' actions related to the IEE Contract or otherwise interfered with Petitioners' procedural safeguards (the "State Complaint Claim")?

## WITNESSES

### For Petitioners:

[REDACTED] Petitioner and mother of [REDACTED]  
[REDACTED] Ph.D., Independent Psychologist  
[REDACTED] M.S., CCC-SPL, Speech Pathologist  
[REDACTED] Ph.D., BCBA, Expert Witness  
[REDACTED] M.S., OTR/L, Occupational Therapist  
[REDACTED] EC Teacher [REDACTED] Charter School

### For Respondent DPS:

[REDACTED] M.D., Expert Witness  
[REDACTED] Ph.D., Lead Psychologist DPS  
[REDACTED] Assistant Principal [REDACTED] Elementary  
[REDACTED] EC Facilitator [REDACTED] Middle School  
[REDACTED] OTR/L, DPS Occupational Therapist  
[REDACTED] School Counselor [REDACTED]  
[REDACTED] Ed.D., EC Director DPS

**For Respondent SBE:** Carol Ann Hudgens, NCDPI Section Chief Dispute Resolution  
Leigh Mobley, NCDPI Consultant Dispute Resolution

## EXHIBITS

The following exhibits were received into evidence during the course of the hearing. The page numbers referenced are the "Bates Stamped" numbers.

**Stipulated Exhibits ("Stip. Ex."): 1-103.**

**Petitioners' Exhibits ("Pet. Ex."): 1, 8, 10 (p. 157), 13 (pp. 287, 295-299, 305, 311, 313-14, 320 21, 326-27, 329-30, 333-34, 341-42, 349, 359, 364) 16 (pp. 381, 382, 385-389), 17 (pp. 119-20), 34 & 35 (for illustrative purposes only), 36-38, 39 (copyrighted material under seal) 40; DPS Ex. 17 (pp. 119, 120, 157).**

**Respondent DPS Exhibits ("DPS Ex."): 1, 2 (pp. 17-40), 6-13, 15, 16 (pp. 88-89, 93), 17 (pp. 100-103, 105, 107, 108), 17 p. 379 admitted, but not for truth of matter asserted)**

**Respondent SBE Exhibits ("SBE Ex."): 1-10**

## **THE APPEAL**

North Carolina provides specific guidelines for the appeal of a decision rendered by an Administrative Law Judge in a special education due process case:

N.C.G.S. § 115C-109.9. Review by review officer; appeals.

(a) Any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 107.2(b)(9) to receive notices.

NC 1504-1.15 Finality of Decision; Appeal; Impartial Review

(a) Finality of hearing decision. A decision made in a hearing conducted pursuant NC 1504-1.8 through NC 1504-1.14 or NC 1504-2.1 through NC 1504-2.5 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and NC 1504-1.7.

(b) Appeal of decisions; impartial review.

(1) The hearing required by NC 1504-1.12 is conducted by the Office of Administrative Hearings. Any party aggrieved by the findings and decision in the hearing may appeal to the North Carolina Department of Public Instruction, Exceptional Children Division within 30 days of receipt of the written decision.

Following the issuance of the Administrative Law Judge's (ALJ) Decision, the Respondent filed a timely appeal. This will be the focus of the review. When reviewing an appeal of an ALJ's decision, the State Review Officer (SRO) may only review the specific issues complained of by the parties. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013). Thus, the review is limited to those specific parts of the ALJ's Decision that were in the Respondents appeal dated April 26, 2019.

The Petitioners' did not file a timely appeal. The SRO was notified on May 14, 2019 by the person designated by the State Board under G.S. 107.2(b)(9) to receive notices of appeal that a copy of an appeal from the Petitioners had been forwarded to her from the Office of Administrative Hearings (OAH). The Petitioner had evidently filed an electronic appeal with OAH, which is not authorized to accept filings on behalf of employees of the State Board. The Petitioner never filed an appeal in accordance with N.C.G.S. § 115C-109.9 and NC 1504-1.15. In an email exchange on May 14, 2019 the Petitioner admitted that the appeal had not been submitted to the person designated by the State Board. This was several days after the deadline set by N.C.G.S. § 115C-109.9 and NC 1504-1.15. The person designated by the State Board to receive notices of appeal chose not to take any action upon learning of the late appeal, instead forwarded the information to the already appointed SRO. This was a wise decision, for the State Board of Education is a party in this proceeding and employees of the State Board should not make decisions that could affect the outcome of the appeal process.

Although the SRO is sympathetic to the desire of the Petitioners to submit an appeal, an appeal must conform to the clear provisions of North Carolina law. There is no doubt that the Petitioners knew of the requirements in N.C.G.S. § 115C-109.9 and NC 1504-1.15. The intent of IDEA and state law and their implementing regulations is to expedite the process used to settle disagreements between local educational agencies and parents of identified children and specify how that process is to be followed. Restrictions regarding time limits to perform specific acts are throughout IDEA and N.C.G.S. § 115C – Article 9. Time restrictions are clearly in those portions pertaining to procedural safeguards. Strict adherence to time restrictions to decide controversies is expected, even required.

This review is limited to the issues delineated in the Respondent's appeal. Though the Respondents appeal is not totally clear and somewhat confusing, the SRO determines that this review will focus on six (6) issues from the ALJ's Decision that could be interpreted to be in Respondent's Notice of Appeal:

1. Whether the DPS's IEE contract included impermissible terms and/or significantly impeded the parent's rights to participate in the IEP decision-making process.
2. Whether DPS committed various procedural violations. *(In the Appeal Notice, the alleged procedural violations were not listed. The ALJ found that procedural errors related to the eligibility determination did not deny FAPE. As the eligibility determination is not being appealed, these procedural violations are not interpreted to be a part of this appeal.)*
3. Whether the Petitioners earned prevailing party status on the IEE contract claim.
4. Whether the ALJ included findings and conclusions outside the statutory time period and/or that were previously settled and waived during a previous Section 504 grievance dispute.
5. Whether the ALJ properly denied the Respondent's Partial Motion to dismiss regarding the application of Rule 41(a) to claims arising prior to August 14, 2017, and
6. Whether the ALJ failed to recognize the mootness of certain claims about the IEE contract.

## STANDARD OF REVIEW

The State Review Officer must render an independent decision, giving "due weight" to the administrative proceedings before the administrative law judge. *Board of Education v. Rowley*, 458

U.S. 176 (1982). Findings of fact by hearing officers are entitled to be considered *prima facie* correct if they are regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth." *Doyle v. Arlington County School Board*, 953 F.2d 100 (4<sup>th</sup> Cir. 1991). In *Doyle*, the court also noted, "By statute and regulation the reviewing officer is required to make an independent decision . . ." *Doyle*, 953 F.2d at 104

When reviewing an appeal of an ALJ's decision, the SRO may only review the specific issues being appealed by the parties. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013)

This SRO finds that the ALJ's Findings of Fact in her Decision were regularly made and adopts and incorporates some of them in this Decision. The ALJ had a total of 838 enumerated facts and 285 conclusions, many of which were unnecessary for the ALJ to render her Final Decision. Most were unnecessary to review in order to reach a decision on the issues that were appealed. For the purpose of brevity and a clearer understanding of the issues in this review, the SRO has chosen to significantly reduce the number of enumerated facts, consolidating and summarizing where applicable. References to the transcript and exhibits are not always included, for many of the following facts are summarizations from many sources in the record. Only facts necessary for reaching a decision regarding the appeal are included in this Decision.

To the extent the Findings of Fact contain conclusions of law or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

## FINDINGS OF FACT

### History of the Case

1. The Petition for Contested Case Hearing at 18 EDC 4980 was filed in and accepted by the Office of Administrative Hearings ("OAH") on August 14, 2018. Previously Petitioners had filed two other contested case petitions: May 18, 2017 (17 EDC 3372) and June 6, 2018 (18 EDC 3427). Both were voluntarily dismissed without prejudice. The June 8, 2018 Petition was subsequently refiled and attached to the Petition for this case, 18 EDC 4980.

2. On August 29 and August 30, 2018, respectively. Respondents SBE and DPS filed motions to dismiss. DPS's motion was denied in its entirety. SBE's motion was denied in part, but dismissal was granted on the issues pertaining to the appeal and investigation process of the State Complaint.

3. Additional dispositive motions for summary judgment and cross motions were filed by all Parties on October 8, 2018. All were denied on October 23, 2018 except for the determination that there were no genuine issues of material fact regarding the claim that DPS unnecessarily delayed the provision of requested independent educational evaluations.

4. The hearing was conducted on October 26 – 31, 2019 by ALJ Stacey Bawtinheimer. At the hearing the Respondent made a Motion in *Limine* to exclude the testimony of witnesses from the charter school, which was granted in part. A [REDACTED] Charter School teacher would be allowed to testify about [REDACTED]'s academic and functional performance at the beginning of the 2017-18 school year and [REDACTED]'s progress during the period she attended [REDACTED]. Evidence regarding [REDACTED] eligibility determination and IEP documentation would not be allowed.

5. Following the Petitioners' case-in-chief, Respondent DPS moved for involuntary dismissal under Rule 41(b). The ALJ declined dismissal until the close of all evidence. Respondents DPS and SBE presented their cases and the hearing was adjourned on October 31, 2018.

6. The ALJ issued her Final Decision on April 11, 2019. The Final Decision stated:

1. Petitioners failed to meet their burden of proof regarding the Suspected Disability Claim. The IEP Team did not overlook clear signs of autism. Petitioners did meet their burden regarding the procedural inappropriateness of the evaluations process in the Evaluation Claim, but failed to prove a substantive violation of a FAPE for [REDACTED]
2. Petitioners failed to meet their burden of proof regarding the Eligibility Claim. The IEP Team appropriately determined that [REDACTED] was not eligible for special education services and that her Section 504 Plan provided appropriate accommodations sufficient to provide her with a FAPE.
3. Petitioners met their burden of proof regarding the IEE Contract Claim. The Limited Relationship Provision in the IEE Contract and DPS' practice of not permitting independent evaluators to act as expert witnesses impeded [REDACTED]'s meaningful participation in the IEP process and violated the other procedural safeguards under the IDEA with respect to due process. To their detriment, Petitioners were not allowed to use the independent evaluators as expert witnesses in their contested case.
4. With respect to the State Complaint Claim, Petitioners did not have standing to appeal NCDPI's Letter of Findings and Corrective Action. Moreover, even if they had, there was no mechanism in place to pursue an appeal and this Tribunal does not have jurisdiction to mandate the State Board to develop such procedures, although the Undersigned recommends that they do just that. Despite this, the State Board was required to "set aside" the pending State Complaint because the same subject matter was contested in the due process Petition before this Tribunal. The Undersigned decided that DPS' Limited Relationship Provision (Contract Provision 3) and DPS' IEE practice (Practice 4) violated the IDEA. In light of this Final Decision and the evidence from this hearing, the State Board should reconsider its Letter of Findings and Corrective Action Plan. Even if the Petitioners did have standing to file a Petition against the State Board, the Petitioners have not met their burden, by a preponderance of the evidence, that the State Board's findings, regarding DPS' Contract Provision 3 and DPS Practice 4, denied [REDACTED] a FAPE or [REDACTED]'s meaningful participation in the IEP process.

IT IS HEREBY ORDERED THAT:

1. DPS is the prevailing Party on the Suspected Disability Claim;
2. Although, ultimately DPS prevailed on the Evaluation and Eligibility Claims, due to DPS' numerous procedural violations with respect to these claims, DPS is not granted prevailing party status on these claims, nor are Petitioners;
3. With respect to the IEE Contract Claim, DPS is prohibited from requiring an independent evaluator to sign a contract with the Limited Relationship Provision or any similar language in the IEE Contract. The Limited Partnership Provision or similar language in any outstanding IEE contracts between DPS and independent evaluators are violative of the IDEA. DPS is to advise all independent evaluators, who have entered into IEE contracts with this prohibited language and the parents of disabled children being independently evaluated pursuant to these IEE Contracts, that the Limited Partnership Provision is to be severed from the contract and have been found not to be agency criteria and, instead, are conditions which violate the IDEA, federal regulations, State law, and the NC Policies;
4. The Petitioners are prevailing parties as to the IEE Contract Claim with respect to DPS;
5. With respect to the State Board Claim, in light of this Final Decision, the Undersigned respectfully requests that the State Board reconsider its Letter of Findings and Corrective Action Plan in State Complaint No. 19-070;
6. The Undersigned makes no determination as to prevailing party status with respect to the State Complaint Claim except to note that Petitioners have exhausted their administrative remedies but failed to prove any substantive denial of FAPE to [REDACTED] by the State Board; and,
7. All other of Petitioners' claims not otherwise dismissed are DISMISSED WITH PREJUDICE

7. The Respondent filed an appeal on April 26, 2019, appealing six (6) issues in the ALJ Decision:

- a. Whether the DPS's IEE contract included impermissible terms and/or significantly impeded the parent's rights to participate in the IEP decision-making process.
- b. Whether DPS committed various procedural violations. (In the Appeal Notice, the alleged procedural violations were not listed.)
- c. Whether the Petitioners earned prevailing party status on the IEE contract claim.
- d. Whether the ALJ included findings and conclusions outside the statutory time period and/or that were previously settled and waived during a previous Section 504 grievance dispute.
- e. Whether the ALJ properly denied the Respondent's Partial Motion to dismiss regarding the application of Rule 41(a) to claims arising prior to August 14, 2017, and
- f. Whether the ALJ failed to recognize the mootness of certain claims about the IEE contract.

8. The undersigned State Review Officer was appointed on April 29 and Written Arguments were requested from all parties on April 30, 2019.

9. At the time the Respondent submitted an appeal there was considerable time remaining in the period during which an appeal could be submitted. In an email communication the Petitioners stated the intention to do. The Petitioners, however, never filed an appeal that met the requirements of N.C.G.S. § 115C-109.9 and NC 1504-1.15.

10. Neither party submitted their arguments by the deadline imposed by the SRO. The Respondent submitted arguments past the deadline and moved for them to be considered. The SRO denied the motion.

11. Some ALJ Facts/Conclusions regarding Suspected Disability/Evaluation/Eligibility Claims are included in this Decision solely for a clearer understanding of case. (The ALJ Decision on these claims was not appealed.)

12. ■ was twelve (12) years old at the time this Petition was filed. (Stip. Ex. 11). During the relevant time period, ■ was domiciled, and is still domiciled within the boundaries of the Durham Public Schools in Durham County, North Carolina. (Stip. Exs. 12 & 13)

13. During the relevant time period, ■ had been diagnosed with Anxiety Disorder, Attention Deficit Hyperactivity Disorder-Combined ("ADHD"), and Sensory Processing Disorder. (Stip. Ex. 2, p. 5) She was also on medication and was receiving therapeutic services from Dr. ■

14. In the second grade (December 2013) ■ had an IEP for a specific learning disability in reading and she received small group instruction in reading (e.g. decoding and other phonic skills). She was later exited in September 2014. (Stip. Ex. 41, p. 210) From that point forward while enrolled in DPS's schools, ■ was a qualified individual with a disability that entitled her to a Section 504 Plan.

15. Following a referral and subsequent evaluation, an eligibility meeting was held on August 15, 2017. The IEP team did not find ■ eligible for special education services. The ■ disagreed with the decision of the IEP team. (Stip. Ex. 11)

16. The mother filed for a due process hearing. The ALJ, despite finding some procedural errors in the evaluation process, determined that ■ did not qualify for special education services. (ALJ Decision, April 11, 2019)

### **The Independent Education Evaluation (IEE)**

17. During the Eligibility meeting on August 15, 2017 [REDACTED] requested an Independent Education Evaluation (IEE) because she disagreed with DPS's evaluations. (Stip. Ex. 13, p. 60) An IEE can be requested if the parent objects to the evaluations conducted by the school system. (34 C.F.R. § 300.502 (b)(1); NC 1504-1.3(b)(1)) The IEP team referred [REDACTED] to Dr. [REDACTED] DPS's EC Director, who has the responsibility to arrange for an IEE.

18. After discussions with Dr. [REDACTED] [REDACTED] followed up on September 6, 2017 with a written request for an IEE. (DPS Ex. 3) The evaluations specifically requested were: Neuropsychological Evaluation, Occupational Therapy Evaluation, and Speech-Language Evaluation.

19. In her referral request, [REDACTED] also wanted the independent evaluators "to have the same opportunity to observe [REDACTED] at school." (Stip. Ex. 57, p. 302) Dr. [REDACTED] initially refused to allow independent evaluators the same opportunity allowed DPS evaluators, but after legal counsel's intervention, the observations were approved. (Stip. Ex. 53) These in-school observations became an issue after the evaluation reports were completed, because one independent evaluator failed to observe in the school setting

20. Dr. [REDACTED] immediately initiated the process to have the IEE's performed, although there was some initial reluctance to agree to the Neuropsychological Evaluation. Dr. [REDACTED] initial position was that DPS was not going to approve the Neuropsychological Evaluation, for DPS had only conducted a Psychological Evaluation. She relented, however, and initiated the process for an IEE to be performed that included all those requested by [REDACTED]

21. [REDACTED] was provided a list of qualified evaluators in the community. [REDACTED]'s choices were not limited to only the evaluators on the list. She was told if she wanted an evaluator not on the list, she was to contact Br. [REDACTED] so that DPS could confirm the evaluator's qualifications. (Stip. Ex. 59)

22. [REDACTED] was not provided any additional criteria nor was she told about the IEE Contract and the contents of that Contract. The Contract contained DPS's agency criteria required for the qualification on IEE examiners and the process for conducting the IEE.

23. [REDACTED] first became aware of the existence of the IEE Contract was December 4, 2017, when Dr. [REDACTED] mentioned in an email to [REDACTED] that she was sending the contracts to the private evaluators. (Stip. Ex. 66, p. 344) [REDACTED] was not given a copy of the contract at that time nor made aware of any agency criteria in that contract. [REDACTED] requested a copy of the IEE Contract on December 5, 2017 and was provided a copy on January 12, 2018. (Stip. Ex. 68, p. 346; Stip. Ex. 69; DPS Ex. 13)

24. On December 22, 2018, Dr. [REDACTED] notified [REDACTED] that [REDACTED] [REDACTED], who had been chosen by [REDACTED] had refused to sign the IEE Contract. (Stip. Ex. 64, pp. 333-341) Ms. [REDACTED] refused to conduct the IEE because of the contract terms. (Stip. Ex. 67) Ms. [REDACTED] wanted all four clauses of the Limited Relationship Provision removed from the IEE Contract but DPS refused. (DPS Ex. 1, p. 7) Unlike a previous IEE Contract signed by Ms. [REDACTED] (Stip. Ex. 87), the revised IEE Contract contained the Exhibit A – "Scope of Professional Services Agreement" with the "Limited Relationship Provision." (Stip. Ex. 86)

25. Dr. [REDACTED] testified that she did not have any concerns about [REDACTED] [REDACTED] qualifications to perform the speech/language evaluation. (Tr. vol. 7, p. 1334) She had been qualified to conduct IEEs in DPS prior to the inclusion of the Limited Relationship Provision.



26. The following IEE's were conducted and provided to both DPS and [REDACTED]

- a. An Occupational Therapy Evaluation, conducted by [REDACTED] [REDACTED] on February 12, 2018. (Stip. Ex. 39)
- b. An Informal Dynamic Social Communication and Pragmatic Language Assessment and Recommendations conducted by [REDACTED] on April 19, 2018. (Stip. Ex. 40)
- c. An Outpatient Psychological Evaluation was conducted by Dr. [REDACTED] during seven days between January 22 and April 30, 2018 and dated May 29, 2019. (Stip. Ex. 41) There was also an Outpatient Psychological Evaluation – Amended Report with an additional day of evaluation, June 8, 2019. This Amended report is undated. (Stip. Ex. 42)

27. The long time period in completion of the IEE's was an initial issue in this case but was dismissed by the ALJ as not being an untimely delay caused by DPS. (ALJ Order dated October 23, 2018) This was not a subject for the appeal.

28. The necessary IEE's were conducted and the results made available to the parent and DPS. The ALJ, however, found that the IEE Contract that was used to obtain the services of the outside providers significantly impeded [REDACTED]'s right to participate in the decision-making process regarding the provision of FAPE to [REDACTED]. The ALJ also determined that the Limited Relationship Provision in the IEE Contracts violated the Petitioners' procedural safeguards. This was the primary focus of the Respondent's appeal.

29. The Respondent never held an IEP meeting to consider the IEE's and revisit the eligibility decision that was made on August 15, 2017. An IEP Meeting scheduled for June 8, 2018, was rescheduled to July 13, 2018 because Dr. [REDACTED] wanted Dr. [REDACTED] to meet with school personnel. (Tr. vol. 7, pp. 1253, 1308) Before this could be accomplished [REDACTED] enrolled [REDACTED] in the [REDACTED] Charter School, another LEA which then took responsibility for the provision of FAPE to [REDACTED]. (Stip. Ex. 68)

30. An IEP team at [REDACTED] Charter School used the data compiled by DPS along with the IEE information to determine that [REDACTED] was eligible for special education services. (Tr. vol. 5, pp. 830-31)

### **The IEE Contract/Procedural Violations**

31. DPS required all the independent evaluators to sign the IEE Contract. The Contract outlined DPS' agency criteria for an IEE. The IEE Contract was labeled "Contract for Performing Independent Evaluation Services." (Stip. Exs. 83, 84, & 85)

32. The controversial provision of the IEE Contract is Exhibit A – "Scope of Professional Services Agreement." The final section of Exhibit A, the Limited Relationship with the Parties ("Limited Relationship Provision") is the portion of the contract that is relevant to this particular case and included in the Petition.

33. The Limited Relationship Provision stated:

Provider agrees to perform the duties as described above and understands that the purpose of this IEE is to assist the IEP team in answering the questions identified in Paragraph 1 above. *To that end* [the IEE], Provider agrees that the scope of its involvement with this student and his education with DPS is limited to the items identified in this Agreement [ ] and will not be further involved in this matter *without the express written consent of both the Parents and DPS*. This includes the following:

- a) Beyond the scope of this agreement, Provider shall not serve as a consultant for either *party*, including any further relationship as a consultant, evaluator, or health care provider for [REDACTED]
- b) Provider will not agree to serve as a witness or expert witness in any future dispute between the *parties*.

- c) Provider will not speak with any attorney, consultant, or third party regarding this student, without the express consent of both *parties*.
- d) In the event Provider is subpoenaed for deposition or testimony, Provider agrees to communicate simultaneously with both *parties* and shall not speak substantively with either *party* in anticipation of Provider's deposition or testimony.  
(Stip. Ex. 83, p. 471 ¶ 4) (*emphasis added*)

34. Though the Petitioners were not a party to the contract, the contract includes reference to parties other than the parties to the contract. Presumably, this would be the parents of a child being evaluated.

35. The definition of Agency criteria is found in IDEA Regulations:

- (1) If an independent education evaluation is at public expense, the criteria under which the evaluation is obtained including the location of the evaluation and the qualifications of the examiner must be the same criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent evaluation.
- (2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.  
(34 C.F.R. § 300.502I)

36. To some extent the term "agency criteria" is ambiguous. The Respondent has a very narrow view of "agency criteria;" the who, what, how, and when aspects of the evaluation and the delivery of the examination results. It does not encompass restrictions placed on the examiner with regard to relationships and other activities of the examiner subsequent to the delivery of the examination results. The Respondent maintained that those are of the nature of a business relationship not governed by IDEA.

37. The Petitioners, however, maintained that it includes conditions imposed on the examiner not only with respect to the who, what, how, and when aspects of the examination, but also on restrictions imposed on relationships and other activities of the examiner subsequent to the delivery of the examination results.

38. Petitioners objected to the Limited Relationship Provision, which they assert impeded ■■■■■'s parents' ability to meaningfully participate in the decision-making process by limiting their ability to work with the evaluators. The Petitioners also maintain that it allowed DPS to manipulate the evaluation process. (Stip. Exs. 83, 84, 85)

39. Petitioners also contended that this contract provision was purposefully designed to impede parents' participation in the IEP process as well as their ability to advocate for their children's needs in a due process hearing and have access to an expert witness.

40. The Petitioners assert that through these provisions, DPS imposed agency criteria upon the independent evaluators that differed from the criteria DPS used when its own evaluators evaluated students.

41. DPS argued that the Limited Relationship Provision served several purposes. It provided clarity and transparency for the evaluator. (Tr. vol. 7, p. 1239) The provisions limiting the evaluator's activities after the evaluation were intended to keep the process independent from influence unrelated to the student's current educational needs. (Tr. vol. 7, p. 1243) It also protected the evaluator from other considerations or influences "so they can focus on the core of the work that's being asked." The evaluator could complete the evaluation independently and not feel pressure, influence to serve in any kind of advocate capacity for not just the parent, but for the

district. They can truly enter and engage in this process focusing on evaluating independently, as an independent source. (Tr. vol. 7, p. 1244)

42. Dr. [REDACTED] testified to her concern that an evaluator may see the independent evaluation as an opportunity to drum up future business with the parent. Dr. [REDACTED] however, confirmed there was no prohibition in the contract to prevent the independent evaluator from conducting future evaluations for the DPS for which the DPS “pay[s] them for their services.” (Tr. vol. 7, pp. 1279–81)

43. Dr. [REDACTED] stated that she was not concerned that the prospect of a longstanding relationship with the DPS with the possibility of conducting multiple independent evaluations would skew the perspective of the evaluator, contents of the evaluations, or the recommendations given by the evaluator. Yet, she was concerned that having an additional relationship with the parent could skew the perspective of the evaluator, the contents of the evaluation, and the evaluator’s recommendations. (Tr. vol. 7, pp. 1282–83) She did not attempt to explain this illogical view.

44. Dr. [REDACTED] explained that the “big reason” for the contract revisions that included the Limited Relationship Provisions was due to “litigation, attorney involvement, most specifically over the past several years, how that has really so significantly changed the landscape of our world and how we used to work together.” (Tr. vol. 7, p. 1242)

45. The Limited Relationship Provisions were sufficiently daunting to Dr. [REDACTED] and Ms. [REDACTED] that they felt compelled to hire legal counsel because of the IEE Contract.

46. As evidenced in the hearing for this case, the Limited Relationship Provisions accomplished the purpose for which they were placed in the IEE Contract. The provisions controlled the Petitioners’ ability to access the independent evaluators to prepare for the hearing, had a “chilling” effect on the testimony of the IEE examiners, and interfered with the Petitioners’ access to expert testimony.

47. Based on statements in the transcript by the ALJ during the hearing while obtaining testimony and later in her Final Decision, the Limited Relationship Provisions in the IEE Contract impacted the trier-of-fact’s access to relevant expert testimony.

48. Following the completion of the IEE evaluations but before submission of the IEE reports, Dr. [REDACTED] used the Limited Relationship Provisions to control the “content” of the IEE’s. Using the contract provisions Dr. [REDACTED] “forced” several of the evaluators to meet or talk with both her and specific DPS staff to get information for evaluations already completed. (Stip. 63, T. vol. 5, pp. 789-90) Some of these staff members were not directly involved with [REDACTED]

49. In at least one instance Dr. [REDACTED] requested a change in the evaluation report. (Stip. 39, T. vol. 5, pp. 775-76) After speaking with Dr. [REDACTED] Ms. [REDACTED] issued a “revised” independent evaluation on March 29, 2018. (Stip. Ex. 39) In the revised evaluation report, Ms. [REDACTED] changed the word “recommendations” to “considerations.” (*Compare* Stip. Ex. 38, p. 7 to Stip. Ex. 39, p. 7) DPS’ staff evaluators, on the other hand, are allowed to make recommendations in their evaluation reports and not asked to label the recommendations as considerations.

50. Following the submission of Dr. [REDACTED] evaluation report, in which she diagnosed [REDACTED] with Autism Spectrum Disorder (Stip. Ex. 41, p. 229), Dr. [REDACTED] requested for Dr. [REDACTED] meet with some DPS staff so that Dr. [REDACTED] could have “balanced” information for a revised evaluation report. Following this meeting, Dr. [REDACTED] provided an amended evaluation report. She, however, did not change her diagnosis.

51. On at least one occasion, Dr. [REDACTED] destroyed rating scales that Dr. [REDACTED] had provided for teacher input. The rating sheets had been given to [REDACTED] to distribute. As [REDACTED] had not chosen the teachers preferred by Dr. [REDACTED] the rating scales were destroyed and new ones distributed to teachers chosen by DPS. (Pet. Ex. 13, pp. 346-48; Tr. 7, p. 1289)

52. Rather than allowing professional evaluators to determine how they were to conduct their evaluations and from whom they needed information, Dr. [REDACTED] attempted to use the Limited Relationship Provisions of the Contract to control the evaluations, including the evaluation reports. IEE's are supposed to be truly independent and free from influence of both parents and school officials.

53. On May 29, 2018, Dr. [REDACTED] notified [REDACTED] that all of the IEE evaluations were completed. (Stip. Ex. 76, p. 431) Dr. [REDACTED] provided an Invitation to Conference for a meeting on June 8, 2018, "to review the IEE reports." (Stip. Exs. 14 & 76) [REDACTED] confirmed that they would be able to attend the meeting. (Stip. Ex. 76, p. 431)

54. On June 5, 2018 Dr. [REDACTED] canceled the IEP meeting to provide for the school district to meet with the independent evaluators. (Stip. Ex. 78, p. 449) The reason given by Dr. [REDACTED] was that all components of the evaluation and IEE Contracts had not been completed. (Stip. Ex. 78, p. 443) All evaluators had previously submitted their final reports. Dr. [REDACTED] had previously deemed the final reports completed on May 29, 2018.

55. On June 5, 2018, Dr. [REDACTED] emailed Dr. [REDACTED]

After full review of your report, I noticed that there is a good deal of information from the parent embedded throughout (which is great), but it does not appear that you spoke with select school staff in order to receive information regarding the student's performance at school and to obtain any other school-based information that may be helpful in the IEE. Since this is included in the contract for the IEE, I would like this information to be sought and included in your evaluation/report of the student.  
(Pet. Ex. 10)

56. Dr. [REDACTED] explained her rationale for canceling the IEP meeting that was scheduled for June 8. Agency criteria for IEE's include in-school observations for some suspected disabilities, such as specific learning disabilities and autism. (NC 1503-2.5) Dr. [REDACTED] explained that she did not immediately review Dr. [REDACTED] lengthy report upon receipt, but shortly thereafter when meeting with Dr. [REDACTED] she noticed that Dr. [REDACTED] had not talked to school folks or observed in the school setting. (Tr. vol. 7, pp. 1254-55).

57. [REDACTED] repeatedly asked Dr. [REDACTED] not to cancel the June 8 IEP meeting as the independent evaluators were already scheduled to attend the meeting and she had already arranged for childcare so she could attend. She reminded Dr. [REDACTED] that the process to obtain services for [REDACTED] began almost a year earlier. (Stip. Ex. 78, pp. 437-48) She also informed Dr. [REDACTED] of her hope that the IEP Team would find [REDACTED] eligible for an IEP and for Extended School Year services during the summer intermission. [REDACTED] was understandably frustrated at the delay of the IEP Meeting.

58. On June 21, 2018, DPS invited [REDACTED]'s parents to attend an IEP meeting to take place on July 13, 2018. (Stip. Ex. 66)

59. During the IEE process, in April/May 2018, [REDACTED] began looking for alternative placements for [REDACTED] On July 11, 2018, [REDACTED] informed DPS that [REDACTED] was enrolled in a public charter school and was no longer enrolled in DPS. (Stip. Ex. 67) [REDACTED] cancelled the July 13, 2018 IEP Meeting.

60. Because of this cancellation, the IEP team did not have a chance to review the IEEs or to revisit its Eligibility Determination. After [REDACTED]'s enrollment at the [REDACTED] DPS was no longer responsible for providing her a FAPE. That responsibility shifted to [REDACTED].

61. The IEE Contract imposed conditions on the independent evaluators that were not imposed on DPS's evaluators. Sections (b) through (d) of Paragraph 4 of the Limited Relationship Provision would prohibit the independent evaluator from agreeing to serve as a witness or expert witness in any future dispute between the parties (DPS and [REDACTED]'s parents); from speaking with any attorney, consultant, or third party regarding [REDACTED] without the express consent of both parties; and require the independent evaluator to communicate simultaneously with both parties in the event the evaluator is subpoenaed for deposition or testimony and not speak substantively with either party in anticipation of the evaluator's deposition or testimony.

62. DPS does not restrict its own employees, who have evaluated a child with a disability, from further serving that child, conducting future evaluations of that child, communicating with attorneys, or serving as a witness.

63. Dr. [REDACTED] admitted that DPS does not place restrictions on its own evaluators. (Tr. vol. 7, p. 1329) Further, DPS employees were allowed to speak with the school attorney without being subpoenaed. (Tr. vol. 7, p. 1330)

64. The Limited Relationship Provision of the IEE Contract had other negative consequences on the Petitioners' procedural safeguards by allowing DPS to interfere with the parent's selection of the IEE evaluator. In this case, [REDACTED] requested that the speech/language IEE be conducted by [REDACTED] [REDACTED] (Tr. vol. 2, p. 361) Though Ms. [REDACTED] was qualified, she was not allowed to perform the IEE because she rejected the restrictions in the Limited Relationship Provision and would not sign the contract. She had previously conducted an IEE for DPS in 2017, but the contract at that time did not have the Limited Relationship Provisions. [REDACTED] was forced to find another evaluator. The parents were given the choice of having an independent evaluator subject to the Limited Relationship Provision or not having an IEE. (Tr. vol. 2, p. 361)

65. The IEE Contracts had a direct impact on the Petitioners in that their due process safeguards were clearly violated. DPS argued that, as evidenced by the hearing, the IEE Contract did not prevent the Petitioners from presenting expert witness testimony. That may be true, but the expert used had very limited knowledge about [REDACTED]. He merely interpreted test results, and did not deliver a very convincing opinion.

66. Dr. [REDACTED] on the other hand spent considerable time with [REDACTED] administering many tests and observing. With regards to [REDACTED]'s disability, Dr. [REDACTED] probably had a better understanding of [REDACTED]'s needs than anyone. She also had the education, experience and expertise to provide expert testimony to assist the ALJ. She, however, was effectively prevented from doing so because of the IEE Contract. The ALJ even noted that Dr. [REDACTED] was very hesitant in answering questions that needed her reliance on her expertise. She had consulted with her own attorney.

67. DPS's use of the IEE Contract Provisions very effectively eliminated the most important tool available to parents for challenging the LEA, witnesses testifying at the due process hearing. It also deprived the ALJ of very valuable expertise.

68. Because of the terms of the IEE Contract, none of the independent evaluators testified as expert witnesses. They were, however, subpoenaed to testify for Petitioners as fact witnesses. As noted by the ALJ in her Final Decision, the provisions in each of their IEE Contracts appeared to affect their testimony.

69. The North Carolina Rules of Evidence prevent “fact witnesses” from testifying as an “expert witness.” Only a witness qualified as an expert by knowledge, skill experience, training, or education, may testify in the form of an opinion. N.C.G.S. § 8C-1, Rule 702. Expert witnesses may also testify on an ultimate issue to be decided by the trier-of-fact, however, fact witnesses may not. (N.C.G.S. § 8C-1, Rule 704)

70. The impact of the Limited Relationship Provision of the IEE Contract was not an unforeseen consequence. It was a planned and well-executed violation of one of IDEA’s most important procedural safeguards. The IEE Contract took away the parents’ ability to effectively challenge DPS’s evaluation.

71. Ultimately, the contract interfered with, not just [REDACTED]’s meaningful participation, but also with her ability to participate fully in the due process hearing regarding the denial of a FAPE to her daughter.

72. Based on the ALJ’s own statement, the effects of the Limited Relationship Provision were chilling and obvious during the hearing. (ALJ Decision, p. 92, 225).

#### **ALJ Findings Outside the Statutory Time Period**

73. The ALJ Final Decision did include findings that were outside the statutory time period. Most were of a historical nature. Some, however, were allowed to be introduced by the Petitioners for the purpose of showing procedural violations committed by DPS regarding the eligibility of [REDACTED] for special education services.

74. The ALJ found that these earlier procedural violations during the process of determining eligibility did not cause a denial of FAPE. As the ALJ’s decision regarding eligibility is not on appeal, it is unnecessary to review those findings outside the normal statutory time period that were related solely to the eligibility determination. They are not relevant.

75. Findings related to the IEE Contract were within the normal statutory time period. Those were properly considered by the ALJ and are included in the previous section of this SRO Decision.

#### **ALJ Determination that Petitioners were Prevailing Party on IEE Contract Claim**

76. The ALJ did determine that the Petitioners were the prevailing party on the IEE Contract claim.

77. A prevailing party is one who wins in a contested case. The ALJ could declare this based on her findings.

78. The ALJ, however, was careful not to extend this to the point of awarding attorney fees, as this is often the outcome in IDEA cases. A parent who is a prevailing party can seek relief in a court for the award of attorney fees.

#### **ALJ’s Denial of Respondent’s Partial Motion to Dismiss regarding application of Rule 41(a)**

79. On August 30, 2018 the Respondent filed a Motion to Dismiss. The ALJ denied the Motion on September 28, 2018. There were two issues in the Motion. The Respondent is appealing only that portion of the denial that pertains to Rule 41(a) issue, specifically whether N.C.G.S. § 1A-1, Rule 41(a)(1) circumvents North Carolina’s one-year statute of limitations for IDEA claims.

80. The application of Rule 41(a) is actually a non-issue. The Respondent made a good argument in the motion that Rule 41(a) is not available to circumvent the one-year statutory limitations in IDEA cases in North Carolina. That argument is one that this SRO normally accepts. The ALJ, in her order denying the motion, provided an extensive explanation why she believes that it does. This

very long treatise was provided with this SRO in mind, as the ALJ was certain that her Final Decision would be appealed and there would be a possibility that this SRO could be appointed as State Review Officer.

81. As the case developed, there are two reasons why it is not necessary for the SRO to make any decision on the application of Rule 41(a) to this specific case on appeal. First, the parts of the ALJ Final Decision being appealed are related to the IEE. These have their origins well within the one-year statutory limitation in North Carolina. Second, the issue of [REDACTED]'s eligibility was not appealed. It was the issues regarding [REDACTED]'s identification and eligibility that required the application of Rule 41(a), for many of the facts the IEP team needed to determine eligibility had origins prior to normal time period established by North Carolina statute of limitations.

82. Also, assuming *arguendo* that the eligibility determination was appealed. It still would not necessitate the use of Rule 41(a) to enter those facts that have their origins in the identification process, even though they are outside the normal statute of limitations. The actions, evaluations and decisions made in the identification process are precursors to determining eligibility. Those would have been reviewed by the IEP team during the eligibility meeting on August 15, 2017 and of necessity would be included as relevant facts. That IEP meeting was covered by the petition, even though facts used by the team occurred slightly over a year prior to the filing of the petition.

83. The SRO finds that the application of Rule 41(a) is not relevant to this appeal.

## CONCLUSIONS OF LAW

### Jurisdictional and Legal Conclusions

1. The Office of Administrative Hearings and the State Review Officer have jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education ("FAPE") pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Part 300 et seq. The provisions of 20 U.S.C. §1415 and N.C. G. S. § 115C- 109.6(a) control this review.

2. As the party seeking relief, the burden of proof for this action lies with Petitioners. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005).

3. IDEA is the federal statute governing the education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300 *et seq.* The primary purpose of IDEA is:

To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and

To ensure that the rights of children with disabilities and parents of such children are protected.  
IDEA, 20 U.S.C. § 1400(d)(A)&(B).

4. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300 *et seq.* (Stip. 4)

5. The controlling State law for students with disabilities is Chapter 115C, Article 9 of the North Carolina General Statutes. (Stip. 7) The State policies promulgated under Chapter 115C, Article 9 are the *Policies Governing Services for Children with Disabilities*.

6. ■ and her mother were residents of Durham County, North Carolina during the period relevant to this controversy. ■ was a child with “suspected” disabilities for the purposes of 20 U.S.C. § 1400 *et seq.* and N.C. G. S. § 115C-106 *et seq.*

7. ■ the parent of ■ was entitled to procedural safeguards available in IDEA and N.C.G. S. § 115C, Article 9. She also has the right to meaningful participation in the IEP process while ■ was being evaluated for eligibility for specially designed instruction under the IDEA.

8. Durham Public Schools Board of Education (“DPS”) is a local education agency (“LEA”) receiving funds pursuant to the IDEA (Stip. 5) and is the LEA responsible for providing educational services in Durham County, North Carolina.

9. Durham Public Schools is subject to the provisions of applicable federal and State laws and regulations, specifically 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*; N.C.G.S. 115C-106 *et seq.* and the *Policies Governing Services for Children with Disabilities*. These acts, regulations and policies require DPS to provide FAPE for those children in need of special education residing within its jurisdiction

10. The professional judgment of teachers and other school staff is an important factor in evaluating an IEP. “Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.” *Hartmann by Hartman v. Loudoun Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982) (stating that “courts must be careful to avoid imposing their view of preferable educational methods upon the States”). The “IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents.” *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004).

11. ALJ’s and SRO’s may not substitute their “own notions of sound educational policy for those of the school authorities” whose decisions are under scrutiny. *Rowley*, 458 U.S. at 206.

12. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017), the Court held that in due process proceedings educators can be expected to offer “a cogent and responsive explanation” for their decisions. The ALJ and this SRO determines that not all educational decisions made by DPS’s educators in this case meet this criterion.

13. Recipients of federal assistance must establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed the procedural safeguards with respect to the provision of a free and appropriate public education. 20 U.S.C. § 1415(a)

14. Congress appeared to have “presumed that if the Act’s procedural requirements are respected, parents will prevail when they have legitimate grievances.” *Schaffer*, 546 U.S. at 60-61.

15. In a due process proceeding, the Supreme Court held in *Rowley* that first there must be a determination of whether the LEA complied with the procedures set forth in the IDEA, and second, whether the IEP developed through those procedures is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. 207. It is the first inquiry that is relevant to this appeal.



16. The procedural requirements in IDEA are purposefully designed to ensure that parents can meaningfully participate in the process of developing an IEP for their child. “It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process. . . as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley*, 458 U.S. at 205–06.

17. A child is denied a FAPE when the IEP Team commits procedural violations that:

- (I) impeded the child’s right to a free appropriate public education;
- (II) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child; or
- (III) caused a deprivation of educational benefits.”  
20 U.S.C. § 1415(f)(3)(E)(ii).

18. In this appeal the issue is whether DPS committed procedural violations that significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child.

19. The procedural violations must “result in some loss of educational benefit or opportunity” and “cannot simply be a harmless error.” *A.K. ex rel. J.K. v. Alexandria City Sch.*, 484 F.3d 672, 684 (4th Cir. 2007). Interference with parental participation rights is clearly a procedural violation. 20 U.S.C. § 1415(f)(3)(E)(ii); N.C.G.S. § 115C-109.8.

20. A substantive procedural violation is one that “seriously infringe[s] the parents’ opportunity to participate in the IEP formulation process,” *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

21. Just prior to the ALJ’s Final Decision in this case, the Fourth Circuit (citing USC §1415(f)(3)(E)(ii)(II)) held that a determination of a substantial violation requires an affirmative answer to all three of these questions:

- a) whether the plaintiffs alleged a procedural violation;
- b) whether the violation significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents child, and;
- c) whether the child did not receive a FAPE as a result.  
*R.F. v. Cecil County Public Schools*, F.3d \_\_\_, No. 18-1780, 74 IDELR 31(4<sup>th</sup> Cir. March 25, 2019)

22. While the *R.F.* case differs somewhat from that in other Circuits, it does provide clear guidance within the Fourth Circuit and for this particular case. For “Unless an ALJ determines a procedural violation denied the child a FAPE, the [ALJ/SRO] may only order compliance with the IDEA’s procedural requirements and cannot grant other forms of relief.” *Id.*

23. The ALJ in her Final Decision on April 11, 2019, found that DPS’s eligibility determination did not deny FAPE to [REDACTED] although DPS committed procedural violations. This portion of her Final Decision was not appealed and the SRO makes no findings regarding it, but the decision in *R.F.* would indicate that no relief could be granted to Petitioners.

### **The IEE Contract Claim**

24. As [REDACTED] disagreed with DPS's evaluations, she was entitled to independent evaluations at public expense. 34 C.F.R. § 300.502 (b)(1); NC 1504-1.3(b)(1).

25. The IEE is defined as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. 34 C.F.R. § 300.502(a)(3)(II).

26. Following a request for an IEE, an LEA must provide the parents the agency criteria applicable to IEE's. 34 C.F.R. § 300.502(a)(2). As DPS did not, this would be a procedural violation.

27. The IEE is one of those specific procedural safeguards that Congress included in IDEA to give parents an opportunity to participate in the decision-making regarding the provision of FAPE to their child. It is a procedural safeguard designed to protect the rights of [REDACTED] and [REDACTED] not DPS.

28. It is reasonable to expect an LEA to enter into a contract agreement with an IEE Provider. Some of the provisions of DPS's IEE Contract and the application of those provisions are the focus of this complaint in the Petition.

29. The Petitioners, in their petition, were not contesting all the terms in the IEE Contract. They contested only the Limited Relationship Provision that imposed on their right to have the independent evaluator conduct a truly independent IEE.

30. The purpose of the IEE Contract was to provide alternative independent evaluation information of [REDACTED]'s educational needs which would have been used during the subsequent IEP meeting to review DPS' original eligibility determination.

31. The IEE Contract contained agency criteria and conditions that were directly related to Petitioners' participatory rights and procedural safeguards under the IDEA. The plain language of 34 C.F.R. § 300.502(c)(2) states that an LEA may not impose any conditions other than the agency criteria. The definition of agency criteria is ambiguous and there is no clear guidance on this specific issue in Federal Regulations, North Carolina Policies, OSEP interpretations, or case law.

32. The best guidance, though not directly on target for this issue, is that OSEP "has consistently affirmed the plain language of the regulations and reiterated that school districts may not impose conditions, timelines, or other limitations on parents' access to an IEE." *Gresham-Barlow Sch. Dist.* at 4 (citing *Letter to Thorne* (OSEP Feb. 5, 1990); see, e.g., *Letter to Petska* (OSEP Sept. 10, 2001); *Letter to Anonymous* (OSEP Jan. 4, 2010)).

33. Ambiguous statutes should be interpreted according to statutory purposes, *Rose v. Lundy*, 455 U.S. 509, 517(1982). There is no doubt that the purpose of 34 C.F.R. § 300.502 (b)(1) and NC 1504-1.3(b)(1) is to provide the opportunity for parents to have a truly independent evaluation of their children with disabilities, and to have the opportunity to use that evaluation to challenge the appropriateness of the LEA's evaluation. These rights are ensured by 20 U.S.C. § 1400(d)(B).

34. When asked, DPS did provide the parents a copy of the contracts for each of the IEE providers. The record does not contain any evidence that DPS otherwise provided the parents with a copy of their agency criteria, as required by 34 C.F.R. § 300.502(a)(2).

35. The SRO favors the interpretation of the Petitioners. Agency criteria includes conditions imposed on the examiner not only with respect to the who, what, how, when aspects of the examination, but also on restrictions imposed on relationships and other activities of the examiner during the evaluation and subsequent to the delivery of the examination results.

36. It may be reasonable to restrict an independent evaluator's communication with attorneys and advocates during an evaluation, for such contact could interfere with the "independent" evaluation. It is not reasonable to have restrictions subsequent to the IEP meeting to review those evaluations. This would be inconsistent with the spirit and intent of IDEA if, through the use of those restrictions, the LEA somehow interferes with parental rights.

37. The Limited Relationship Provision extends well beyond the actual evaluation. Parents have legitimate interests in getting additional insights concerning their child at some time subsequent to the IEP meeting during which the IEE evaluation was discussed. According to the Limited Relationship Provisions of the contract, there can be no further contact between the parents and the evaluator. IEP team meetings are often fast-paced, hectic, and confusing to parents. It could be days, weeks, or even months after an IEP meeting before parents can even ask intelligent questions about the evaluation results. Preventing access would certainly impede the capability of the parents to effectively participate in decision-making regarding their child's educational program.

38. An IEE must meet the same criteria used by the school district in its evaluation "to the extent those criteria are consistent with the parent's right to an independent educational evaluation." 34 C.F.R. § 300.502(e)(1). These criteria must be the same criteria the school district uses when it initiates an evaluation. The school district cannot impose other conditions on the independent evaluator. 34 C.F.R. § 300.502(e)(2).

39. The Limited Relationship Provision used by DPS in its IEE Contracts for [REDACTED]'s independent evaluators did impose other conditions. Several of these had the effect of impeding parental participation and/or violating procedural safeguards guaranteed to parents. Such conditions are inconsistent with IDEA and are unrelated to an examiner's ability to conduct an IEE.

40. The specific restrictions in the Limited Relationship Provision are unrelated to the purpose of the IEE or an examiner's ability to conduct an IEE. If, in an overt or subtle fashion, they impede parental participation or the rights of parents to challenge an LEA's evaluation, then those restrictions are an infringement of the parent's rights.

41. During the hearing for this case, it was telling when Dr. [REDACTED] responded to questions about the Limited Relationship Provision of DPS's Contract with IEE providers. Though she voiced be a supporter of having IEE's, she indicated that IEE's have become a mechanism for increasing litigation and advocacy. The subtle message underlying her comments is: Let us (school officials) do our job and quit questioning what we do.

84. The Limited Relationship Provision of the contract appears to be designed to inhibit advocacy and litigation. This was an egregious procedural violation, calculated to interfere with Petitioners' procedural safeguards.

42. In this particular case the IEE's were unduly influenced by DPS through the use of the Limited Relationship Provisions of the IEE contract. Rather than allowing the professional evaluators to independently conduct the IEE's, DPS attempted to control the process and even the content of several of the evaluations. This is a clear procedural violation of IDEA. The IEE is supposed to provide an evaluation of the child that is not influenced by either LEA or parents. The ethical guidelines for the professions and the professional judgments of qualified evaluators should regulate the IEE.

43. DPS's use of the Limited Relationship Provision to influence the content of evaluations had a definite effect. The wording or contents of two of the IEE's were altered at the request of a DPS official. DPS may maintain that the evaluators were not required to change the content of the

evaluations, but referencing the contract when the request is made indicates otherwise. This not only interferes with parental participation but also is a violation of procedural safeguards. IEE's are intended to give parents an opportunity to obtain evaluations that are not produced or influenced by the LEA. Although the changes requested by DPS in this instance were relatively minor, they are still procedural violations.

44. Denying the parents access to an evaluator could significantly impact the parents' ability to participate in an IEP meeting. The IEE evaluator certainly should be there when the evaluation is initially discussed in an IEP meeting. The Contract allows for this. The Contract, however, prevents parental access beyond this point. It is well understood that IEP meetings are confusing to many parents. They may have misunderstandings or questions about an evaluation subsequent to the evaluation being initially discussed in an IEP meeting. Using contractual terms to place restrictions on an evaluator, such that they cannot even respond to parental questions, is a significant impediment to the parents' right to participate effectively in the decision-making process for their child.

45. When disagreements arise between parents and schools over the provision of FAPE, "[b]y the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement." *Andrew F.*, 137 S. Ct. at 993.

46. When the Supreme Court assigned parents the burden of proof, they also explained the significance of parents' right to an IEE as an essential procedural safeguard. Though this is probably *dicta*, it is persuasive:

School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them.... [Parents] have the right to an independent educational evaluation of the[ir] child.... The regulations clarify this entitlement by providing that a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR § 300.502(b)(1) (2005). IDEA thus ensures parents' access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

*Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005)

47. Reading both the Supreme Court's decisions in *Schaffer* and *Andrew F.* together; by the time any dispute reaches Court, the parents should also have a complete opportunity to use the expertise and judgment of independent evaluators regarding areas of disagreement. The IEE is designed to provide substantive information about the child's educational needs and assist the parent in meaningful participation in the IEP process and, if necessary, assist the parent in meaningful participation in due process. An IEE is a parent's primary tool to challenge the LEA's evaluation and decisions based on the results of the LEA's evaluation.

48. An IEE may also be necessary to assist the hearing officer to make meaningful decisions in a contested case hearing. Hearing officers have the authority to order an IEE at public expense during a hearing. 34 C.F.R. § 300.502(d).

49. Either party can introduce the IEE at the due process hearing. 34 C.F.R. § 300.502(c)(2).

50. The Limited Relationship Provision required both parties' consent to allow the independent evaluator to testify as an expert witness. DPS argued that exclusion of the independent evaluators from testifying as expert witnesses, without both party's consent, would guarantee impartiality of the evaluator. How one reaches this conclusion is unclear.

51. Pursuant to the terms of the IEE Contract, none of the independent evaluators testified as expert witnesses. They did, however, testify for Petitioners as fact witnesses.

52. The North Carolina Rules of Evidence prevent “fact witnesses” from testifying as an “expert witness.” Only a witness qualified as an expert by knowledge, skill experience, training, or education, may testify in the form of an opinion. N.C.G.S. § 8C-1, Rule 702. Expert witnesses may also testify on an ultimate issue to be decided by the trier-of-fact which “fact witnesses” may not. N.C.G.S. § 8C-1, Rule 704.

53. Hearing officers as the designated trier-of-fact are in the best position to determine whether expert testimony should be admitted and what weight, if any, should be accorded that expert testimony. State evidentiary standards govern whether the testimony is relevant, reliable, and based on sufficient facts and data. *Id.*

54. Because of the complicated nature of many disabilities, ALJ’s often rely on the opinions of expert witnesses.

55. There is a possible fallacy in the arguments used by the Petitioners and accepted by the ALJ. The IEE Contract Provisions pertaining to being a future witness or expert witness state that they must agree not to be a witness or expert witness. It does not prevent their being subpoenaed. The ALJ during the hearing could determine if a subpoenaed witness is an expert witness, which for some reason did not happen in this case. The effectiveness of such an expert witness would be limited because the parents could not use that expertise in preparation for the hearing.

56. The parents were prevented from using the expertise of the IEE evaluators as expert witnesses in a due process hearing. While the Limited Relationship Provisions do not prevent evaluators from being subpoenaed as fact witnesses, the parents would be prevented from requesting the evaluators to testify as either fact or expert witnesses. When questioned during a hearing, the attitude and possibly the credibility of the witness can be different depending on whether the individual is testifying voluntarily or being forced to testify through the use of a subpoena. Legal purists may insist that this is not the case, but reality is different. In North Carolina, this especially important, because only expert witnesses can give opinions during their testimony.

57. There are no Federal Regulations regarding expert witnesses. The U.S. Department of Education declined a request to regulate the testimony of experts at a due process hearing because “such determinations are made on a case by-case basis in light of the specific facts of each case.” Federal Register vol. 71, No. 156, p. 46691. Hearing officers, as the designated trier-of-fact under the ACT, are in the best position to determine whether expert testimony should be admitted and what weight, if any, should be accorded that expert testimony. State evidentiary standards govern whether the testimony is relevant, reliable, and based on sufficient facts and data. *Id.*

58. The provisions in the contract directly contradicted the Supreme Court’s decision in *Schaffer*, which explained the parents’ right to an IEE “was to ensure parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion.” *Schaffer*, 546 U.S. at 60–61.

59. The Eleventh Circuit’s interpretation of *Schaffer* is helpful in this case: “the parental right to an IEE is not an end in itself; rather, it served the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation.” *T.P. ex rel. T.P. v. Bryan County School Dist.*, 792 F.3d 1284, 1293 (11th Cir. 2015).

60. DPS’s Limited Relationship Provision was purposefully designed to control litigation and attorney involvement in special education matters, not to insure the impartiality of the independent

evaluator. This contradicts DPS's obligation to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE.

61. The Limited Partnership Provision was improper and inconsistent with IDEA's ultimate goal of protecting the rights of disabled children and their parents. Those provisions imposed inappropriate conditions for an IEE. The purpose was to intentionally thwart the parents' ability to challenge DPS's decisions in due process.

62. Although DPS has failed to offer a cogent and responsive explanation for using the Limited Partnership Provision to violate ■■■ and ■■■'s rights, the Petitioners have not met their burden of showing that FAPE was denied.

63. The Petitioners were unable to show that these procedural violations affected the provision of FAPE, primarily because ■■■ was enrolled in another LEA before the completion of the IEE's. This prevented an IEP team from receiving and considering those evaluations.

64. As there was no showing that DPS denied FAPE because of the procedural violations committed by DPS in the use of its Limited Partnership Provision in its IEE contract, the ruling of the Fourth Circuit in *R.F.* applies; "Unless an [ALJ/SRO] determines a procedural violation denied the child a FAPE, the [ALJ/SRO] may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief." *R.F. v. Cecil County Public Schools*, F.3d \_\_\_, No. 18-1780, 74 IDELR 31 (4<sup>th</sup> Cir. March 25, 2019)

65. Because ■■■ is now being served by another LEA, several of the restrictions of the Limited Partnership Provision are possibly moot with regards to the relationship between DPS and the Petitioners. They, however, are still in effect regarding the provision of FAPE by another LEA, restricting parental involvement in decision-making and violating the parents' procedural safeguards. This latter issue, however, is not before the SRO.

66. Even if the procedural violation does not cause a denial of FAPE to the child, IDEA and state law state: "[n]othing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with the procedural requirements under this section." 20 U.S.C. § 1415(f)(3)(F); N.C.G.S. § 115C-109.8(b). Therefore, the ALJ and SRO do have authority to order DPS to comply with the IDEA but cannot grant other forms of relief.

67. N.C.G.S. § 115C-109.6, § 115C-109.9, NC 104-1.14, and NC 104-1.15 provides the authority of ALJ's and SRO's in North Carolina. That authority is limited to making decisions regarding a specific petition filed on behalf of a named child. Thus, any orders must be narrowly tailored and limited to the actions of an LEA relative to that child.

68. Though the authority of an ALJ's and SRO's is limited, there is nothing that prohibits an ALJ or SRO from notifying or advising DPS that continued use of a contract with provisions similar to the Limited Partnership Provisions used in this case would be a procedural violation of IDEA. Such contract provisions interfere with parents' participation in decision-making regarding their children and violate procedural safeguards.

### **Summary of Conclusions**

69. The ALJ properly denied the Respondent's partial motion to dismiss of August 14, 2017.

70. The Respondent appealed the ALJ's inclusion of findings and conclusions outside the normal statutory time period. Those findings and conclusions pertained to the suspected disability and

eligibility claims. As those portions of the ALJ's Final Decision were not appealed, there is no need for the SRO to address this part of the Respondent's appeal.

71. The use of the IEE contract with the Limited Relationship Provision allowed DPS to interfere with the parent's participation in the decision-making with regard to [REDACTED] and to violate the procedural safeguards built into IDEA and state law. Specifically:

- a. DPS did not provide [REDACTED] a copy of the agency criteria applicable to IEE's.
- b. The parent was prevented from choosing their preferred evaluator.
- c. DPS staff caused evaluator reports to be changed, thus the evaluations were not truly independent.
- d. Except for an initial review of results, the parents had no access to the evaluators, the individuals who probably had the most knowledge of [REDACTED]'s unique needs. Consultations and/or future evaluations would be prohibited.
- e. Going forward, the parents would be prohibited from inviting the evaluator to an IEP meeting, although IDEA clearly provides the right of a parent to invite any person they choose.
- f. The parents, and their attorney, were prevented from accessing the evaluators to prepare for a due process hearing. Granted, there is nothing to prevent the parents from obtaining depositions from those evaluators and/or using subpoenas for them to serve as witnesses.
- g. The parents were prevented from using the expertise of the evaluators as expert witnesses in a due process hearing.

72. The procedural violations committed by DPS did not deny FAPE.

73. With respect to the IEE Contract claim, the Petitioners are the prevailing party. They, however, are not entitled to any relief under the provisions of *R.F. v. Cecil County Public Schools*, F.3d \_\_\_, No. 18-1780, 74 IDELR 31 (4<sup>th</sup> Cir. March 25, 2019)

74. Under the provisions of 20 U.S.C. § 1415(f)(3)(F) and N.C.G.S. § 115C-109.8(b), the ALJ and SRO can still order DPS to comply with the IDEA and state law. No other forms of relief can be granted.

75. DPS is therefore ordered to comply with the requirement of IDEA and N.C.G.S. §115C, Article 9. As [REDACTED] is now being served by another LEA and there is no longer a relationship between the Petitioners and DPS, no order can be implemented that grants any relief to Petitioners.

76. DPS is notified and advised that continued use of a contract with provisions similar to the one used in this case would be a procedural violation of IDEA. Such contract provisions interfere with parents' participation in decision-making regarding their children and violate procedural safeguards.

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Based on the foregoing Findings of Facts and Conclusions of Law, the State Review Officer makes the following:

### DECISION

The Final Decision and Order of Administrative Law Judge Stacey B. Bawtinhimer dated April 11, 2019 is upheld in part.

1. The Respondent committed procedural violations through the use of the IEE Contract with the Limited Relationship Provision. The Limited Relationship Provision allowed DPS to interfere with the parents' participation in decision-making with regard to [REDACTED] and to violate the procedural safeguards of IDEA and state law.

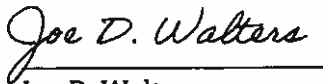
2. Although the Petitioners met their burden in showing Respondent's procedural violations regarding the use of the Limited Relationship Provision, they are not entitled to any relief.

3. DPS is notified and advised that continued use of a contract with provisions similar to the one used in this case would be a procedural violation of IDEA. A contract with IEE providers cannot be used in a manner that interferes with the parents' participation in decision-making with regard to their children or violates the procedural safeguards of IDEA and state law. Following the receipt of a request for an IEE, the Respondent must provide parents with its agency criteria, to include restrictions placed on evaluators in the contracts with IEE providers.

4. Those ALJ Orders not pertaining to the petition for this specific case are reversed, for the authority of ALJ's and SRO's is limited to making decisions regarding a specific petition filed on behalf of a named child.

5. The State Review Officer makes no decision regarding those issues not appealed by the Respondent.

This the 25<sup>th</sup> day of May 2019



Joe D. Walters  
State Review Officer

### NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C.G.S. § 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. § 1415.



I hereby certify that this Decision has been duly served on the Petitioner, Respondent, and their attorneys by electronic and certified U.S. Mail; and to others by electronic and U.S. Mail addressed as follows:

■ and ■  
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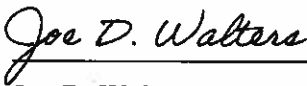
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This the 25<sup>th</sup> day of May 2019



Joe D. Walters  
State Review Officer

